



1 Nationality Act (“INA”), 8 U.S.C. § 1229(a)(b)(5)(C). *Id.* Petitioner further contends that his  
2 deportation from the United States violates INA § 240(b)(5)(C), the Due Process Clause of the  
3 Constitution, and his right to effective assistance of counsel. *Id.* at 2.

4 Respondents have filed a motion to dismiss, arguing *inter alia* that petitioner is lawfully  
5 detained pursuant to INA § 241, 8 U.S.C. § 1231 because he is subject to a final order of  
6 removal. (Dkt. 11.) Respondents further contend that his detention is not indefinite and does not  
7 violate *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), because his  
8 removal to El Salvador is significantly likely to occur in the reasonably foreseeable future. *Id.*

9 For the reasons set forth below, the Court recommends that petitioner’s habeas petition be  
10 DENIED, respondents’ motion to dismiss be GRANTED, and that this matter be DISMISSED  
11 with prejudice.

## 12 II. BACKGROUND AND PROCEDURAL HISTORY

13 Petitioner is a native and citizen of El Salvador who entered the United States on August  
14 8, 2001, without inspection by an immigration officer. Administrative Record (“AR”) at R53-  
15 54, R38-39. On August 10, 2001, petitioner was apprehended by Border Patrol Agents and  
16 served with a Notice to Appear, placing him in removal proceedings and charging him as subject  
17 to removal pursuant to INA § 212(a)(6)(A)(i), as an alien present in the United States without  
18 being admitted or paroled. (AR L46-48.) The Notice to Appear ordered petitioner to appear  
19 before an immigration judge at a date and time to be set by the immigration court. (AR L48.)  
20 The Notice to Appear advised petitioner of his duty to update his address after any changes, as  
21 well as the consequences of his failure to do so. (AR L47.) Petitioner was later released under  
22 bond in the amount of \$7500. (AR L10, L6, R25.)

23 On October 2, 2001, the immigration court sent petitioner a hearing notice stating that

1 petitioner's hearing was scheduled to take place on April 2, 2002, at 9:00 a.m., in San Antonio,  
2 Texas. (Dkt. 15, Ex. 1 at 34.) The notice indicates that it was mailed to petitioner's last  
3 provided address at 12439 – 23rd Avenue South, Seattle, Washington 98168. *Id.* On April 2,  
4 2002, petitioner failed to appear for his removal hearing. (AR L57.) Petitioner alleges that he  
5 did not attend the hearing because he never received notice of the removal hearing. (Dkt. 15 at  
6 3, Ex. 1 at 12.) On April 3, 2002, the Immigration Judge ("IJ") found that petitioner was not  
7 present and no reasonable cause was provided for his failure to appear. (AR L20-21.)  
8 Therefore, the IJ issued an *in absentia* order of removal, which was mailed to petitioner on April  
9 17, 2002. (AR L20-22, L56-57.)

10 On or about April 4, 2002, petitioner, through counsel Lilia Gonzales, filed a motion for  
11 change of venue and request for telephonic hearings.<sup>1</sup> (AR L12-19.) In the motion, Ms.  
12 Gonzales conceded that petitioner is removable and that the allegations in the notice to appear  
13 are true, but that he would be filing an application for relief from removal. (AR L17.) Along  
14 with the motion, Ms. Gonzales also filed both a notice of appearance and a motion for  
15 withdrawal of counsel. *Id.* On April 25, 2002, the immigration court received a letter from  
16 petitioner indicating that he had received the *in absentia* removal order, and that he wanted his  
17 case transferred to Seattle, Washington. (AR L55; Dkt. 15, Ex. 1 at 28-30.) The letter further  
18 indicated that he was still residing at 12439 – 23rd Avenue South, Seattle, Washington. *Id.*

19 On July 2, 2010, ICE arrested petitioner at his home in Seattle, Washington, for removal  
20 to El Salvador. (AR L27.) Almost immediately thereafter petitioner obtained counsel who filed  
21 a motion to reopen *in absentia* order, asserting that he never received notice of the hearing. (AR

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23 <sup>1</sup>Petitioner alleges that Lilia Gonzales was not his attorney, that he never retained her, and  
never authorized her to file any pleadings on his behalf. (Dkt. 15 at 5, Ex. 2 at 7, 11, 13.)

1 L24-36.) On October 4, 2010, the IJ denied the motion to reopen, finding that petitioner had  
2 “NOT shown that his failure to appear was because of no notice.” (AR L54-57.) Petitioner filed  
3 a Notice of Appeal to the Board of Immigration Appeals (“BIA”) on November 4, 2010, which  
4 dismissed the appeal as untimely. (Dkt. 15 at 6 n.3.)

5 On October 20, 2010, petitioner filed the instant habeas petition, together with an  
6 emergency request for stay of deportation. (Dkt. 1.) The Court subsequently entered a  
7 temporary stay of removal, pending briefing and a resolution of petitioner’s request for stay.  
8 (Dkt. 3.) Respondents have filed a motion to dismiss, arguing that petitioner’s detention is  
9 lawful under INA § 241. (Dkt. 11.) The parties have also submitted supplemental briefing  
10 addressing petitioner’s claims that he did not receive proper notice, and that his deportation  
11 violates INA § 240(b)(5)(C), the Due Process Clause of the Constitution, and his right to  
12 effective assistance of counsel. (Dkts. 13, 15, 16, 17.)

13 On December 10, 2010, petitioner, through counsel, filed a second motion to reopen and  
14 reconsider with the immigration court. (Dkt. 15, Ex. 2.) This motion remains pending.

### 15 III. DISCUSSION

16 Petitioner seeks an order staying his removal from the United States pending the outcome  
17 of his motion to reopen with the Immigration Court.<sup>2</sup> (Dkt. 15 at 12.) He argues that the REAL  
18 ID Act does not preclude habeas review because he is not seeking review of an order of removal,  
19 but instead maintains that because he was not given proper notice, his removal order is null and  
20 void. *Id.* at 12-15. Respondents argue that the Court lacks jurisdiction in this matter because  
21 petitioner’s petition directly challenges his removal order, and the REAL ID Act divests district  
22 courts of jurisdiction to review removal orders or claims arising from the execution of a removal  
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<sup>2</sup>Petitioner does not seek judicial review of his custody status. (Dkt. 15 at 18.)

1 order. (Dkt. 17 at 2-4.) The Court agrees with respondents that it lacks jurisdiction over  
2 petitioner's claims.

3 On May 11, 2005, Congress enacted the REAL ID Act of 2005, which made several  
4 significant changes to the judicial review procedures of the INA. *See* REAL ID Act of 2005,  
5 Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005). The REAL ID Act eliminated habeas corpus  
6 jurisdiction, including jurisdiction under 28 U.S.C. § 2241, over final orders of removal and  
7 vested jurisdiction to review such orders exclusively in the courts of appeals. *See, e.g., Alvarez-*  
8 *Barajas v. Gonzales*, 418 F.3d 1050, 1052 (9th Cir. 2006).

9 Section 242(a)(5) of the INA, as amended by the REAL ID Act, provides that “a petition  
10 for review filed with an appropriate court of appeals in accordance with this section shall be the  
11 sole and exclusive means for judicial review of an order of removal entered or issued under any  
12 provision” of the Act. INA § 242(a)(5), 8 U.S.C. § 1252(a)(5). Section 242(b)(9) further  
13 provides that “[j]udicial review of all questions of law and fact, including interpretation and  
14 application of constitutional and statutory provisions, arising from any action taken or  
15 proceeding brought to remove an alien from the United States . . . shall be available only in  
16 judicial review of a final order under this section.” INA § 242(b)(9), 8 U.S.C. § 1252(b)(9). In  
17 addition, Section 242(g) provides: “Except as provided in this section and notwithstanding any  
18 other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf  
19 of any alien arising from the decision or action by the Attorney General to commence  
20 proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.”  
21 INA § 242(g), 8 U.S.C. § 1252(g). The REAL ID Act makes clear that judicial review of an  
22 administratively final order of removal is only available before the court of appeals having  
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1 jurisdiction over the district where petitioner's immigration judge holds seat.<sup>3</sup>

2 "A request to stay an order of removal based on a pending collateral claim does not  
3 escape the jurisdiction stripping provisions of the REAL ID Act." *Mancho v. Chertoff*, 480 F.  
4 Supp. 2d 160, 162 (D.D.C. 2007) (citing *Formusoh v. Gonzales*, No. 3-07-CV-0128-K, 2007 WL  
5 465305 (N.D. Tex. Feb. 12, 2007) (dismissing for lack of subject matter jurisdiction habeas  
6 petition of petitioner seeking stay of removal pending resolution of an I-130 petition and an I-  
7 485 adjustment of status petition)); *Tale v. United States Dep't of Homeland Sec.*, 2006 U.S.  
8 Dist. LEXIS 47577, at \*1 (S.D. Tex. July 13, 2006) (finding lack of jurisdiction to grant  
9 petitioner preliminary and permanent injunctions barring his deportation prior to the resolution of  
10 his claims pending before an immigration judge). Absent statutory or legal authority that creates  
11 an exception to the REAL ID Act, this Court lacks subject matter jurisdiction over petitioner's  
12 request for a stay of removal during the pendency of his motion to reopen before the immigration  
13 court.

14 Petitioner claims the Court may entertain his request for stay, notwithstanding the REAL  
15 ID Act, because he never received notice of the removal hearing and, therefore, the removal  
16 order does not exist. He argues that (1) he has the right to pursue a motion to reopen in order to  
17 demonstrate that he did not receive notice; (2) he was denied due process because he was ordered  
18 removed without notice; and (3) his removal will prevent him from being represented by counsel  
19 before the IJ and in any appeal proceedings before the Attorney General in violation of 8 U.S.C.

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20 <sup>3</sup>"In cases that do not involve a final order of removal, federal habeas corpus jurisdiction  
21 remains in the district court, and on appeal to [the court of appeals], pursuant to 28 U.S.C. §  
22 2241." *Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) ("By its terms, the  
23 jurisdiction-stripping provision [of the REAL ID Act] does not apply to federal habeas corpus  
petitions that do not involve final orders of removal"); *see also Singh v. Gonzales*, 499 F.3d 969,  
972 (9th Cir. 2007) (holding that district courts retain jurisdiction to review post-BIA ineffective  
assistance of counsel claims which do not involve review of a final order of removal).

1 § 1362 and due process. (Dkt. 15.) Petitioner's claims inevitably require review of his *in*  
2 *absentia* order of removal, and are therefore barred under the REAL ID Act. As indicated  
3 above, any available challenge to the underlying removability of petitioner can only proceed  
4 through a petition for review with the appropriate circuit court of appeals. INA § 242(a)(5).

5 Moreover, there is no question that petitioner is seeking to circumvent INA § 242(g) in  
6 requesting that the Court stay his removal until there has been a final administrative decision on  
7 his motion to reopen. Section 242(g) provides that "no court shall have jurisdiction to hear any  
8 cause or claim by or on behalf of any alien arising from the decision or action by the Attorney  
9 General to . . . execute removal orders against any alien." INA § 242(g); *see also Reno v.*  
10 *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 119 S. Ct. 936 (1999)(holding  
11 that INA § 242(g) bars judicial review of three discrete actions the Attorney General may take:  
12 "the 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal  
13 orders.'"). Petitioner's request that this Court stay the execution of his removal order while he  
14 seeks additional administrative review directly impacts the government's ability to "execute" his  
15 removal order and thus is plainly precluded under INA § 242(g). *See Sharif v. Ashcroft*, 280  
16 F.3d 786, 787 (7th Cir. 2002)("A request for a stay of removal 'arises from' the Attorney  
17 General's decision to execute a removal order."); *see also Nken v. Chertoff*, 559 F. Supp. 2d 32,  
18 36 (D.D.C. 2008)(holding that the REAL ID Act strips the district court of jurisdiction to  
19 consider a request for stay of removal); *Sadhvani v. Chertoff*, 460 F. Supp. 2d 114, 122 (D.D.C.  
20 2006)(holding petitioner's challenge to respondents' decision to execute a removal order while  
21 his motion to reopen was pending clearly arises from the decision or action by the Attorney  
22 General to execute a removal order and is thus subject to the unambiguous jurisdiction-stripping  
23 language of INA § 242(g)).

1           Petitioner relies on *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007), and *Kumarasamy v.*  
2 *Att’y Gen. of U.S.*, 453 F.3d 169 (3rd Cir. 2006), in arguing that the REAL ID Act does not  
3 preclude habeas jurisdiction. However, for the reasons asserted by respondents and described  
4 below, *Singh* and *Kumarasamy* do not alter the Court’s conclusion that it lacks jurisdiction.

5           In *Singh*, the Ninth Circuit considered whether the district court had jurisdiction over the  
6 petitioner’s habeas petition alleging ineffective assistance of counsel on the ground that counsel  
7 failed to file a timely petition for review of the BIA’s decision. *Singh*, 499 F.3d at 969. There,  
8 the Ninth Circuit reasoned that an ineffective assistance of counsel claim “cannot be construed as  
9 seeking judicial review of a final order of removal” because petitioner’s “only remedy would be  
10 the restarting of the thirty-day period for the filing of a petition for review with [the court of  
11 appeals]. In other words, a successful habeas petition in this case will lead to nothing more than  
12 ‘a day in court’ for [the petitioner]” *Id.* at 979. The Court concluded that the REAL ID Act did  
13 not preclude habeas review of a claim of ineffective assistance of counsel which only seeks to  
14 restart the thirty-day period for the filing of a petition for review. *Id.*

15           Here, however, petitioner does not seek reissuance of the BIA’s decision, but rather to  
16 enjoin respondents from executing his removal order while his motion to reopen is pending in  
17 immigration court. Unlike *Singh*, petitioner’s requested relief would require this Court to review  
18 his final order of removal. As discussed above, the REAL ID Act bars this Court from reviewing  
19 final orders of removal and claims arising from the Attorney General’s decision to execute  
20 removal orders in the circuit courts of appeals. INA §§ 242(a)(5), (g). Thus, petitioner’s habeas  
21 petition does not fall within the exception to the REAL ID Act outlined in *Singh*.

22           Likewise, *Kumarasamy* is not on point. There, the Third Circuit reaffirmed the district  
23 court’s dismissal for lack of jurisdiction on the ground that the petitioner, after being deported,



1 was no longer “in custody” for purposes of subject matter jurisdiction under the habeas statutes.  
2 *Kumarasamy*, 453 F.3d at 172. In reaching its decision, the Third Circuit considered whether it  
3 had to convert petitioner’s habeas petition to a petition for review because the REAL ID Act took  
4 effect while his appeal was pending. *Id.* at 171-72 (Section 106(c) of the REAL ID Act provides  
5 that habeas petitions challenging orders of removal that were pending before a district court or a  
6 court of appeals on the effective date of the Act are converted to petitions for review). The Court  
7 concluded that petitioner was not seeking review of an order of removal, but was instead  
8 claiming that his deportation was illegal because there was no order of removal. *Id.* at 172.  
9 However, the Third Circuit did not reach the question of whether INA §§ 242(b)(9) and 242(g)  
10 applied in that case because it concluded “that the District Court lacked jurisdiction on the  
11 separate ground that Kumarasamy was not ‘in custody’ at the time he filed his habeas petition.”  
12 *Id.* at 173 n.5. Nevertheless, the Third Circuit specifically noted,

13 In the REAL ID Act, Congress amended both 8 U.S.C. §§ 1252(b)(9) and (g) to  
14 make clear that these provisions preclude any habeas corpus review over certain  
15 removal-related claims. *See* REAL ID Act §§ 106(a)(2) & (3). Thus, if an alien  
challenges an action taken or a proceeding brought to remove him, it would  
appear that 8 U.S.C. §§ 1252(b)(9) and (g), as amended by the REAL ID Act,  
would preclude habeas review over that challenge.

16 *Id.* at 172-73 n. 5 (emphasis added). Thus, contrary to petitioner’s argument, the Third Circuit’s  
17 decision in *Kumarasamy* lends support to respondents argument that the REAL ID Act  
18 forecloses district jurisdiction under the circumstances in the present case. *See Sadhvani v.*  
19 *Chertoff*, 460 F. Supp 2d 114, 123 n.5 (D.D.C. 2006).

20 Accordingly, because the Court lacks jurisdiction to grant the requested relief under the  
21 REAL ID Act, the petition should be denied and dismissed.  
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1 IV. CONCLUSION

2 For the foregoing reasons, the Court recommends that petitioner's petition for writ of  
3 habeas corpus be denied, respondents' motion to dismiss be granted, and that this matter be  
4 dismissed for lack of subject matter jurisdiction. A proposed order accompanies this Report and  
5 Recommendation.

6 DATED this 24<sup>th</sup> day of January, 2011.

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BRIAN A. TSUCHIDA  
United States Magistrate Judge  
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